

Sharma (Migration) [2018] AATA 3388 (20 August 2018)

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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Akhil Chand Sharma
Ms Sherolyn Sashika Sen
Mr Alvin Avishek Chand
Miss Aditti Amishka Chand

CASE NUMBER: 1516385

DIBP REFERENCE(S): BCC2015/1248658

MEMBER: Ian Berry

DATE: 20 August 2018

PLACE OF DECISION: Brisbane

DECISION: The Tribunal affirms the decision not to grant the applicants Temporary Business Entry (Class UC) visas.

Statement made on 20 August 2018 at 10:21am

CATCHWORDS

Migration – Temporary Business Entry (Class UC) – Subclass 457 (Temporary Work (Skilled)) – Bogus documentation – English language test results – Failed IELTS test multiple times – Test results sent for remarking through agent – Satisfactory marks received – Original marks not returned to the applicant – Decision under review affirmed

LEGISLATION

Migration Act 1958, ss 65, 359A

Migration Regulations 1994, Schedule 2 cl 457.224 Schedule 4 Criteria 4020

CASES

Arora v MIBP [2016] FCAFC 35

Batra v MIAC [2013] FCA 274

Trivedi v MIBP [2014] FCAFC 42
Kaur-v-MIBP [2017] FCAFC 184
Plaintiff M64/2015-v-MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 19 November 2015 to refuse to grant the applicants Temporary Business Entry (Class UC) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 29 April 2015. The delegate appointed by the Department of Immigration and Border Protection (Department) refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.457.224 of Schedule 2 to the Migration Regulations 1994 (the Regulations) because the review applicant submitted a bogus document namely an International English Language Testing System result (IELTS), upon which he relied in support of his application for being granted a UC-457 visa, and there were not any compelling circumstances affecting the interests of Australia or compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen, to justify the waiving of the provisions of PIC 4020.
6. The review applicant appeared before the Tribunal on 1 November 2017 to give evidence and present arguments. The Tribunal received oral evidence from the review applicant only.
7. The other applicants were not represented in relation to the review.
8. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.457.224 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and

- the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
- the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
- neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).

10. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

11. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
12. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.

13. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.

14. ***Background***

15. The applicant's account of the creation of the bogus document arises from his dissatisfaction of IELTS test result he obtained in Fiji.

16. The applicant concedes having sat for ten IELTS tests dating back to 2003, and not having achieved the result necessary in satisfying the minimum test result required to obtain the language criteria for a 457 visa.

17. In 2013, the applicant sat for two IELTS tests. One was on 6 April 2013, and the other on 14 December 2013.

18. ***6 April 2013 IELTS test result***

19. The applicant achieved the test result of 4.5 for listening; 5.0 for reading; 5.5 for writing; 6.0 for speaking, giving an overall band score of 5.0.

20. As will be mentioned later in this decision, there was confusion on his part, as he says he was advised that the score was inadequate to qualify for a 457 visa. The applicant believed that he needed a band score in each discipline of 5.0.

21. ***14 December 2013 IELTS test result***

22. The applicant sat for the second test on 14 December 2013, so he could qualify for the 457 visa.

23. The Tribunal has not sighted the initial test result, but understands that the test result was less than the result dated 6 April 2013. The Tribunal was told that the band score for each subject was listening – 4.5; reading 3.5; writing – 5.5; speaking 5.0, and the overall band score of 4.5.

24. After the remarking, which happened over a period of three days, the applicant received the remarked test result, but was told the original could not be returned to him.

25. Leading to the remarking of his IELTS test result of 14 December 2013, he sought an opinion from a migration agent in Fiji for advice on the making an application for a 457 visa. He found this migration agent by reading an advertisement in the newspaper in Fiji and then visited one Ms Singh of Linkon Migration. Ms Singh was a migration agent and solicitor who told the applicant that his IELTS result could be remarked, for which a fee is payable. He paid that amount for the remarking as remarking could not be done without payment. The applicant paid the fee and was told that he should return in 3 days.
26. On returning to this migration agent, he was told that the remark resulted in the following result:

27.	Listening	28.	6
		.0	
29.	Reading	30.	6
		.0	
31.	Writing	32.	6
		.0	
33.	Speaking	34.	6
		.0	
35.	Overall band score	36.	6
		.0	

37. The original test result of 14 December 2013, as the applicant states, was disappointing. This was his motivation to have the test remarked. He did not understand as to how his 14 December 2013 test result could be less than his 6 April 2013 test result.
38. The applicant was satisfied the 14 December 2013 test result and used it when applying for his UC 457 visa.
39. The applicant did not produce any corroborating document of the authenticity of the transaction such as a receipt, an invoice, and correspondence to or from the migration agent about this advice or corroborating documents from the IELTS test centre.
40. ***Discovery of the bogus document***
41. The Department enquired as to the authenticity of the IELTS test result with the IDP Education Pty Ltd. The response was the IELTS

certificate tendered did not match the results of the results held with that organisation.

42. Upon receiving that information, on 28 May 2015, the Department wrote a “natural justice” letter to the applicant. He was requested to give a response by a prescribed date.
43. The applicant’s agent responded in a five page letter. In essence, the agent’s instructions were that the applicant was “fully unaware of the nature of this matter prior to the Natural Justice letter being issued by...the department”.
44. The response further submitted:
45. *“The client instructed that he originally sat an IELTS test in 2013 and obtained the results (dated 6 April 2013), as attached, which shows the applicant achieved an overall score of 5.5 (with listening 4.5, reading 5.0, writing 5.5 and speaking 6.0)*
46. *At the time (as you are already aware) the threshold for passing the IELTS test for the purposes of obtaining a subclass 457 visa was a score of not less than 5.0 in each band and therefore the attached IELTS test was insufficient to satisfy the 457 or other work visa requirements (such as the ENS or RSMS visas).*
47. *On that basis the client sought to re-sit the IELTS test which he did on 14 December 2013”.*
48. The IELTS test he sat for on 14 December 2013 was the test that was the subject of the re-marking.
49. On 19 September 2017¹ The Tribunal wrote a Natural Justice letter to the applicant concerning the IELTS test results. The response from the applicant’s migration agent in an email dated 30 September 2017² was to include documents and provide an explanation of the 6 April 2013 and 14 December 2013 tests. The documents included with this email are:
- a. Statutory Declaration of the applicant dated 29 September 2017³;
 - b. National Police Certificate⁴;
 - c. Fiji Police – Police Clearance Certificate⁵;
 - d. Letter from the Fiji Police Force giving advice that the applicant’s name does not appear on the criminal indices of the Criminal Records Office of the Fiji Police Force;

¹T1, folio 80.

²T1, folio 95.

³T1, folio 94.

⁴T1, folio 93.

⁵T1, folio 92.

- e. Pay advice from the applicant's employer⁶;
 - f. Submission from the migration agent dated 28 November 2015⁷;
 - g. Reference from the Ministry of Works and Transport and Public Utilities dated 11 November 2011⁸;
 - h. IELTS Test report form dated 6 April 2013⁹;
 - i. Offer of employment dated 10 April 2015 (the applicant's current employer)¹⁰
50. The applicant did not disclose the IELTS test result of 6 April 2013 in his visa application of 29 April 2015. On page 13 of that visa application, it states "*You should attach a copy of the test report form to your application (if you have completed more than one test you should attach copies of all test reports)*". The remarked IELTS 14 December 2013 test result was the disclosed test result.
51. At the Tribunal hearing, the applicant disclosed to having taken ten IELTS tests in all over a long period of time.
52. At the hearing, his testimony did not change. He maintained that he only paid for a remarking for which he paid a fee.
53. However, there were anomalies with his version of events. He could not remember the agent's details. Though the woman who assisted him (Ms Singh) said she was a solicitor and a migration agent, and armed with that information, the applicant could not locate her or her firm.
54. The applicant said she no longer practices at the business place where he asked for the remarking. He gave over to this migration agent Ms Singh, the original of the IELTS results certificate and never received the return of the original certificate on the conclusion of the remarking. He only received the remarked IELTS Certificate dated 14 December 2013.
55. The applicant was unable to proffer any corroborative evidence supporting his version of events.
56. The Tribunal is satisfied that the IELTS results contained in certificate named "Test Report Form" and dated 14 December 2013 was a bogus document.
57. By letter dated 20 March 2018, sent under s.359A of the Act, the applicant was formally advised of the IELTS test form was not

⁶T1, folio 91.

⁷T1, folio 90.

⁸T1, folio 87.

⁹T1, folio 86.

¹⁰T1, folio 85.

authentic. In response, through his migration agent he provided the Tribunal with the following:

- a. An undated submission;
- b. Another submission undated but headed "The Australian Sponsoring Employer Factor and 4020";
- c. An email dated 24 June 2015 the applicant's employer to the Department of Immigration.

58. The applicant's submission is set out in the following quote from his migration agent¹¹:

59. *"On 29th of April 2015, the applicant's migration lawyer lodged his work visa application and at that time the applicants IELTS results in hand were from test undertaken on 14 December 2013 and test undertaken on 6 April 2013.*

60. *Before lodgement of the work visa, the applicant's lawyer had advised him that the IELTS score required for the work visa was a minimum score of 4.5 in each band and other criteria for the work visa was assessed and explained to the applicant.*

61. *Thus, the applicant was aware that both the IELTS results from 14 December 2013 and the one from 6 April 2013 were meeting the English language requirement for the work visa. If at any point the applicant had known that the remarked result from 14 December 2013 was false or incorrect, the applicant would have never given it to the immigration and instead given only the IELTS result from 6 April 2013 which was still valid and met the English requirement for the work visa."*

62. Relevantly, only the 14 December 2013 results were mentioned in the applicant's visa application, and the Tribunal concludes that the 6 April 2013 was not given to the Department. It is clear, the applicant relied on the 14 December 2013 result to support his visa application.

63. The applicant's representative submitted on the applicant's behalf, that he acted in good faith and submitted all the IELTS results which he thought were valid.

64. It is further submitted, as an extension of the submission of having a valid IELTS result:

65. *"...is further submitted on the applicant's behalf that the 2015 IELTS results had a validity of 3 years and the above*

¹¹T1, folio 128.

2 results were still valid on the date of the visa application. The few other IELTS that the applicant undertook were in 2011 and 2012 (the IELTS results that the applicant has with him has been attached to this submission, we note that the applicant even met the IELTS requirement from the results from 13 October 2012)."

66. The Tribunal finds that the IELTS test result dated 14 December 2013 is a bogus document and therefore the applicant does not meet Public Interest Criteria (PIC) 4020(1).

Should the requirements of cl.4020(1) be waived?

67. The requirements of cl.4020(1) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.

68. Compelling circumstances?

69. *"PIC 4020(4) sets up a two-staged inquiry. It obliges the decision maker first to be satisfied that there are 'compelling circumstances'. Only then may the decision maker go on to consider those circumstances in the application of his or her discretion". Kaur-v-MIBP [2017]FCAFC 184 at paragraph numbered 26.*

70. The expressions '*compelling circumstances*' and '*compassionate or compelling circumstances*' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see *Plaintiff M64/2015-v-MIBP* [2015] HCA 50. The ordinary meaning of '*compassionate*' relates to feelings of sympathy, sorrow, pity or concern for others.

71. The applicant does not raise reasons which are compellable that affect the interests of Australia, other than sub-paragraph 53 c below.

72. *Compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand justifying the granting of the visa.*

73. The applicant's submissions and evidence tendered from the applicant's employer raises issues that may be for relevant consideration by the Tribunal under this PIC4020(4)(b).

74. In considering subclause 4020(4)(b), consideration should be given to the applicant's employer, as an Australian citizen, having employed the applicant and the difficulties to which he will be put, in respect of his business, in having to recruit a another employee to replace the applicant should that be the decision.
75. The Tribunal refers to the applicant's employer requesting the applicant's situation be viewed favourably by this Tribunal. His employer writes that the regional area where the applicant is employed (one of the largest regional towns of Queensland) and where he and his family now live, will affect those who rely on the applicant and his work, and his spending.
76. The applicant's employer tells of how difficult it is for his business to find suitable employees with the experience and credentials of the applicant.
77. Relevantly, the employer refers to matters which affect his business. He says in making the case that the Tribunal decision should consider the following¹²:
- a. *"Our position is that the position that Mr Sharma is to fill within our business has been vacant for some time and it has been very difficult to fill the position locally. This has had an adverse effect on our business' productivity moving forward as his position covers one of the core areas of our business.*
 - b. *Therefore not having Mr Sharma would make it detrimental to our business and even this delay in processing is costing us dearly in not having him here.*
 - c. *Australia will continue to benefit from our company sponsoring temporary business entrance as it provides expansion of Australian trade in goods and services, and competitiveness within sectors of the Australian economy.*
 - d. *We continued to struggle to find suitable staff with the relevant skills and/or experience in the local workforce and continue to get a high level of client orders from you and existing private and corporate clients and require staff to meet the demands of these orders.*
 - e. *Our ability to be able to service our clients enables us to become more competitive in our industry and therefore recruit more staff.*

¹² T1, folio 3.

- f. The benefits to the Australian economy and workforce are already immense and will continue to grow and we always put hiring Australians before migrants.*
 - g. Mr Sharma also brings with him a special set of skills that allows for training apprentices to a high standard which we are very keen on.*
 - h. We only ever utilise the subclass 457 visa program to fill genuine gaps in our workforce and this is certainly a genuine gap.*
 - i. Given that we are in a regional location covering a highly competitive market that is under continuous threat by global pressure we require the assistance and understanding of the Government to ensure our needs are met. Namely where we have a dire need for a particular specialised skill set, and the right applicant is available, we'd like the opportunity to be able to employ them.*
78. The employer has referred to one reason where it may be a compelling reason in the interests of Australia, namely the employment of the overseas workers including the applicant will make Australia more competitive and expand trade in goods and services: (see 53c above).
79. On balance, the increase of trade in goods and services in employing the applicant is, if measureable, is temporary, as the inference drawn by the employer is that the business cannot apply for another visa applicant with skills similar if not identical to that of the applicant. The reality is the business is still able to avail itself of the services of another visa holder.
80. The Tribunal finds that the applicant has not submitted to the Tribunal satisfactory reasons that either come within compelling circumstances affecting the interests of Australia, or compelling or compassionate circumstances which affect an Australian citizen, an Australian permanent resident or an eligible New Zealand.
81. Therefore, therefore, the Tribunal finds that PIC4020 should not be waived.
82. On the basis of the above, the applicant does not satisfy PIC4020 for the purposes of cl.457.224. As the primary applicant does not satisfy this clause, it follows the secondary applicants do not satisfy cl. 457.321. Therefore, they do not satisfy all the requirements for the grant of a UC 457 visa.

83. The Tribunal finds that the applicants do not meet any other sub-class of visa.
84. The applicant has only applied for a sub-class UC 457 visa and there is no other basis upon which another sub-class of visa could be considered.

DECISION

85. The Tribunal affirms the decision not to grant the applicants Temporary Business Entry (Class UC) visas.

Ian Berry
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is **false or misleading in a material particular** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

Migration Act 1958

s.5 Interpretation

- (1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or

- (c) was obtained because of a false or misleading statement, whether or not made knowingly.